Supreme Court, U.S.
FILED

10-143

JUL 13 2010

No. _____

OFFICE OF THE CLERK

In the
Supreme Court of the United States

JOHN A. SHEPARDSON AS TRUSTEE FOR
THE ESTATE OF CLARA JEAN SHEPARDSON,
Petitioner,

v.

S. TODD MITCHELL, M.D.,
Respondent.

On Petition for Writ of Certiorari
to the Court of Appeal of the State of California,
Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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July 13, 2010

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QUESTION PRESENTED

Did the State Trial Court, and the California Appellate Court violate the Estate Trustee's U.S. Constitutional First Amendment Free Speech Rights by ordering him to not discuss the entire matter subject matter of his publicly filed lawsuit?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the court below:

Appellant is Estate Trustee John Shepardson for decedent Clara Jean Shepardson and Respondent is S. Todd Mitchell, M.D.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT 5

I. THE TRIAL COURT COMMITTED A CONSTITUTIONAL ERROR BY BARRING APPELLANT FROM SPEAKING ABOUT THE ENTIRE SUBJECT MATTER OF THE LAWSUIT 5

CONCLUSION 7

APPENDIX

Appendix A: Appellate Decision (January 7, 2010) 1a

Appendix B: Trial Court Order (November 14, 2008) 13a

Appendix C: Denial of Petition for Rehearing (February 1, 2010) 22a

Appendix D: Denial of Petition for Review by California Supreme Court (April 14, 2010) 23a

Appendix E: Petition for Rehearing (January 22, 2010) 24a

TABLE OF AUTHORITIES

PAGES(S)

CASES

Allgeyer v. Louisiana,
165 U.S. 578 (1897) 5

Kuhn v. Dep't of Gen. Servs.,
22 Cal.App.4th 1627 (1994) 5

Terry v. Conlan,
131 Cal.App.4th 1445 (2005) 5, 6

Walton v. Meuller,
180 Cal.App.4th 161 (Sixth Dist. Dec. 2009) ... 6

UNITED STATES CONSTITUTION

First Amendment 1, 5

Fourteenth Amendment 5

STATUTES AND CODES

28 U.S.C. 1257 1

Cal. Civ. Code § 1542 4

Code of Civ. Proc. § 664.6 7

Code of Civ. Proc. § 1858 6

MISCELLANEOUS

CACI § 1700 4

OPINIONS BELOW

The opinions below were not reported. Trial Court order was entered on November 14, 2008. Appellate court opinion issued January 7, 2010, and Petition for Rehearing Denied on February 1, 2010. The Petition for Review was denied on April 14, 2010.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. 1257. The Trial Court order was entered on November 14, 2008. Appellate court opinion issued January 7, 2010, and Petition for Rehearing Denied on February 1, 2010. The Petition for Review was denied on April 14, 2010.

CONSITUTIONAL PROVISION INVOLVED

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The parties entered into an in-court settlement agreement, which recited its terms. The right to speak out about what happened to Decedent Clara Jean Shepardson while under the medical care of Respondent S. Todd Mitchell, M.D. was asserted by Appellant Trustee and his attorney (presently both are her son, and this writer), and agreed to by the parties.

Later, the Trial Court confirmed the in-court settlement, and then arbitrarily altered it by imposing three fundamental changes, which materially exceeded and changed the agreed terms, *including directing Appellant to not talk about the subject matter of the lawsuit.*

Appellant seeks relief from the Trial Court's arbitrary denial of Appellant's United States Constitution First Amendment Right of Free Speech.

THE IN-COURT SETTLEMENT TERMS

The parties entered into a "binding, enforceable settlement agreement" on the record.

Contract terms were:

1) Appellant's attorney asserted the right to discuss the subject matter of the lawsuit. "I'm willing to agree to confidentiality as the settlement amount, but *I do not agree to muzzle my opinions* in the future about the conduct that my mother had inflicted upon by Dr. Mitchell. And so if the scope of the nondisparaging clause is simply that I will not make untrue or inaccurate statements, then I'm agreeable to that. But beyond that, hypothetically, if I were to write an article in the newspaper or a book about this event, I would not want to be sued for violation of a

vague statement about nondispargement." (emphasis added)[1]

2) After much discussion, debate and negotiation, the parties, and their counsel agreed to the Trial Judge's expressly stated on the record definition of defamation as a "knowing false statement", and based thereon, the parties agreed not defame each other.

Terms expressly rejected:

1) Any prohibition about discussing what happened to Clara Jean Shepardson while under care of Respondent Doctor S. Todd Mitchell, or making disparaging comments: "I'm willing to agree to confidentiality as the settlement amount, but I do not agree to muzzle my opinions in the future about the conduct that my mother had inflicted upon by Dr. Mitchell. And so if the scope of the nondisparaging clause is simply that I will not make untrue or inaccurate statements, then I'm agreeable to that. But beyond that, hypothetically, if I were to write an article in the newspaper or a book about this event, I

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[1] The California State Attorney General has recently brought an action against former Dominican Hospital employee Suiping Mao who was Clara's Nurse the night she died. According to the Coroner's official report, Clara died while on Comfort Care, a level of care expressly rejected by Clara's family. The California Department of Public Health in November 2007 issued a Statement of Deficiencies against Dominican for failing to follow its policies and procedures with respect to Clara's care the night she died, September 3, 2005.

would not want to be sued for violation of a vague statement about nondispargement."

In a response to Appellant's Motion to Confirm, Respondent's counsel sought to change the in-court settlement and submitted a Release to Trial Court that proposed material modifications:

1) "If the *parties or their legal advisors are asked about this Agreement or the subject matter of the litigation*, the parties shall inform any person who so inquires that the parties have *satisfactorily resolved any disagreement* that may exist between them and have *agreed not to discuss the matter with anyone.*" (emphasis added)

Appellant refused to agree to, and rejected, the proposed modifications (RT 252-263):

Appellant's motion to enforce to exact terms of in-court settlement was rejection of Respondent's proposed modifications.

Trial Court confirmed settlement, and then made new contract terms:

1) Prohibited speaking about the subject matter of the lawsuit;

2) Attorney fees to the prevailing party;

3) Waiver of California Civil Code § 1542;

4) Californa Approved Jury Instruction ("CACI") 1700 and its definition of defamation; and

5) Release of entities other than Respondent's counsel.

ARGUMENT

I.

THE TRIAL COURT COMMITTED A CONSTITUTIONAL ERROR BY BARRING APPELLANT FROM SPEAKING ABOUT ENTIRE SUBJECT MATTER OF THE LAWSUIT.

One, Appellant rejected in the in-court settlement attempt to eliminate its Free Speech rights to discuss what happened to the decedent while under Respondent's care.

Two, the Trial Court ordered the opposite, that Appellant and its "legal advisors" (if applies to trial counsel another error, given clear and unequivocal on-the record objection) not talk about the subject matter of the case with anyone, and to *falsely* state that he agreed to not discuss the subject matter. This was a clear violation of Appellant's Free Speech Rights under the First Amendment of the United States Constitution, which applies to the State's through the Fourteenth Amendment. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

Three, the California standard of review is whether there is substantial evidence to support the trial court's ruling. *Terry v. Conlan,* 131 Cal.App.4th 1445, 1455 (2005, 6th Dist., Opin. by J. Rushing, joined by J. Elia and J. McAdams). Substantial evidence must be reasonable, credible and of solid value. *Kuhn v.*

Department of General Services, 22 Cal.App.4th 1627, 1633 (1994). Here, there was no evidence, let alone clear and convincing evidence, to support agreement not to speak about the subject matter of the case (excepting keeping confidential the settlement negotiations and amount, and not to defame).

Four, Code of Civil Procedure § 1858 states:

> CONSTRUCTION OF STATUTES AND INSTRUMENTS, GENERAL RULE. In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in the terms or in the substance contained therein, *not to insert what has been omitted, or to omit what has been inserted*; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. (emphasis added)

Thus, the will of the people, as reflected in the statute, prohibits inserting terms not agree to, and it was err for the Trial Court to place a permanent "Gag" order on Appellant's Free Speech Right to speak about the entire subject matter of a publicly filed and litigated lawsuit.

Five, trial courts are barred from making terms or adjudicating differences; it can only interpret or settle them. *Terry v. Conlan*, *supra*, at p. 1460. Thus, both statutory and case law prohibited the court from inserting a term not agreed to—such as waiver of Free Speech Rights to discuss the subject matter of the lawsuit and decedent's mistreatment under Respondent's care. *Walton v. Meuller*, 180 Cal.App.4th

161, 172 (Sixth Dist. Dec. 2009, Opin. by Duffy, joined by Elia and Rushing, same Panel which decided this case), recognized the basic rule, and inexplicably not followed here, regarding C.C.P. 664.6: "The statute's sole remedy—entry of judgment pursuant to the terms of the agreed settlement...."

CONCLUSION

The parties struck a bargain, in-court, on the record, before a Judge, with three attorneys present. The right to speak about the subject matter of the suit had been insisted upon, and agreed to.

The Trial Court arbitrarily imposed a Free Speech prohibition on speaking about the entire subject matter of the suit. The confidentiality agreement was only for the amount and negotiations; and there was an agreement not to defame—there was never any agreement to not discuss the entire subject matter of the lawsuit—it fact this was expressly rejected.

We ask this Court make right a clear Constitutional wrong, and set aside the Trial Court's permanent "Gag" order prohibiting Free Speech concerning the subject matter of the lawsuit.

Our courts must be a bulwark for protecting our right to speak out, not the author unconstitutional censorship. It is grave error when a Trial Court arbitrarily denies a Constitutional Rights, and an Appellate Court upholds that action.

If the state action is upheld, the message is all Civil litigants should run, not walk, from settling in court,

for fear any agreement will be arbitrarily and fundamentally altered by the Courts.

We ask this Court to send a clear message that Freedom Speech must not be arbitrarily denied by our state and federal courts.

Respectfully submitted,

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Dated: July 2010